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Supreme Court, U.S.
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In The
Supreme Court of the United States

RUFINO MUÑIZ RIVERA, et als.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent

On Petition For A Writ of Certiorari To The United States Court of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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81 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeal's Opinion in this case departs from this Court's holding in *Block v. Neal,* which determined that a homeowner's claim for negligent supervision of the construction of her home was not barred by the Federal Tort Claims Act's misrepresentation exception.

2. Whether the Court of Appeal's Opinion in this case conflicts with this Court's holding in *Berkovitz v. United States* because there are specific regulatory provisions applicable to this case which preclude discretion on the part of the agencies involved.

LIST OF ALL PARTIES

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Petitioners

vs.

United States of America

Respondent

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Appendix B-Opinion and Order of The United States District Court For the District Of Puerto Rico Entered May 20, 2002. 20a – 46a

Rufino Muñiz Rivera, et als, respectfully petition this Court for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered April 7, 2003.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the First Circuit was entered April 7, 2003. (App. A.) The Judgment and Opinion of the United States District Court for the District of Puerto Rico was entered on June 11, 2002 and is reported as *Muñiz Rivera v. U.S. 204,* F. Supp. 2d 305 (D.Puerto Rico 2002) (App. B).

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on April 7, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATUTES AND RULES INVOLVED

The Federal Tort Claims Act, 28 United States Code Section 1346 (b) provides for:

> "claims against the United States, for money damages, accruing on or

after January 1, 1945, for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment under circumstances where the United States if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Section 2680 provides:

"The provisions of this chapter and section 1346 (b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency

> or an employee of the Government, whether or not the discretion involved be abused."
>
> (h) "Any claim arising out of ... misrepresentation..."

Code of Federal Regulations Title 7, Chapter XV11, Sub chapter A, Part 1806 Subpart B Section 1806.25 provides:

> "FmHA financial assistance may be extended to eligible applicants meeting the eligibility requirements of § 1806.24 of this subpart, provided the following conditions are also met:
> (a) *Dwelling and multi-unit housing facilities*. (1) If the financial assistance is to buy a dwelling or multi-unit housing facility:
> (i) The first floor elevation of the habitable space of the dwelling or housing unit must be above the 100-year flood level.
> (ii) The housing must be served by public utilities and facilities, such as, sewer, gas, electrical and water systems that are located and

constructed to minimize or eliminate flood damage, or have an onsite water supply system and waste disposal system located so as to avoid impairment of such systems and contamination from the waste disposal system to the water supply system from flooding."

STATEMENT OF THE CASE

A. Introduction

Petitioners are homeowners of two residential developments approved and financed by Farmers Home Administration (FmHA) (now known as Rural Development) of the United States Department of Agriculture and the Federal Housing Administration (FHA) of the Department of Housing and Urban Development (HUD). The developments are subject to substantial and recurrent flooding. The housing developments were constructed in accordance with specifications approved by FmHA/FHA and minimum property standards issued by HUD as adopted by FmHA/FHA. The sellers, issued builder's warranties for the purpose of inducing FmHA/FHA to make, insure or guarantee loans for purchase of the homes. Pursuant to the

loan documentation, Petitioners are required to carry out repairs that FmHA/FHA requests and implement home management plans that FmHA/FHA may prescribe. FmHA/FHA was to require Petitioners to acquire flood insurance or acquire such flood insurance and charge them to the debts and increase payments accordingly. Petitioners are required to personally occupy the properties within 60 days of execution of the forms provided by Respondent and not lease or use the homes for other purposes. Respondent agencies were to inspect and supervise the properties to ensure compliance with Respondent's requirements.

B. Procedural History

The Petitioners filed administrative claims before the Federal Housing Administration, (FHA), Department of Housing Urban Development (HUD) and Rural Development, formerly Farmers Home Administration (FmHA) of the United States Department of Agriculture on February 26, 1998 and February 29, 2000, after two major floods in September 1996 and September 1998. The administrative claims were denied. The complaint was filed in the United States District Court for the District of Puerto Rico on September 3, 1998. The District Court initially granted the defendant's

motion to dismiss and simultaneously granted Plaintiffs' motion to amend the complaint. The District Court subsequently granted defendant United States' motion to dismiss for lack of subject matter jurisdiction on May 20, 2002, entered June 11, 2002. Plaintiffs appealed from the final Judgment and the underlying Opinion and Order on July 15, 2002. The United States Court of Appeals for the First Circuit heard oral argument on March 3,2003 and entered Judgment and Opinion on April 7, 2003, affirming the Judgment and Opinion of the District Court on other grounds.

C. Statement of Facts

Petitioners are homeowners and former homeowners of residences in Urbanización La Margarita and Extensión La Margarita in Salinas, Puerto Rico, a housing project approved and financed by the Federal Housing Administration (FHA) Department of Housing and Urban Development (HUD), and Rural Development, formerly known as the Farmers Home Administration (FmHA). Construction of the Project began in 1973. The entire Project site is located within the Nigua River flood way zone. The Project is located in Zone A (Zone 1). The Project's sewer and drainage system is inadequate and subject to back flow when the River

level rises. The Project site has been a known flood area since at least September 1928 when Hurricane San Felipe struck. Other major floods struck in September 1933, August 1956, October 1970, September 1975, October 1985, January 5-6 1992 and September 19, 1996. The January 5-6, 1992 flood, which affected the community, had an estimated recurrence interval of 5 years. Four years and approximately 9 months later Petitioners suffered major flooding which forms the basis of Petitioners' claims. In addition, minor flooding occurred in May and September 1992 and October 1997. Flooding in the community also occurred on September 21, 1998, associated with the passage of Hurricane George.

When the homeowners purchased their residences they were unaware that the site of the Project was a flood prone area. The fact that the properties qualified for federal programs and that there was to be extensive oversight by the federal government led the homeowners to believe that the homes would be quality housing and an appropriate investment of their lifetime earnings.

The floods have been of different magnitudes and different residences have been affected with each flood. The first flood, which actually affected some residences, was in October 1985. However, the January 1992 and the September 1996 floods affected all of the homes.

After the January 1992 flood, homeowners participated in numerous meetings with government authorities and were informed, in writing, that the flood was due to a 100-year rain event and that channel improvements to the Nigua River were planned by the United States Army Corps of Engineers.

In September 1996, the Army Corp of Engineers issued a Final Feasibility Report, which indicated the history of floods, that have affected the Project site and that flooding would recur at an interval of 5 years.

A committee composed of homeowners of the Project contacted and met with numerous government agencies and private institutions for assistance concerning the flooding problem, this resulted in the implementation of home protection measures such as installation of flood gates and flat valves by each homeowner.

The homeowners have not received any supervision or technical assistance from Farmers Home or the Federal Housing Administration concerning flooding damages.

The project was constructed in accordance with specifications approved by FmHA/FHA and minimum property standards issued by HUD as adopted by FmHA/FHA. The sellers issued builder's warranties for the purpose of inducing FmHA/FHA to

make, insure or guarantee the loans.

The mortgage deeds, executed by Petitioners as debtors, constitute ongoing mortgages in favor of FmHA/FHA over the properties and all rights, interests, servitude, inheritance rights, adhesions, rents, credits, benefits in all products and income therefrom, all improvements or personal property at present or in the future adhered or reasonably necessary to the properties. The deeds also secure recapture of any interest credit or subsidy. The deeds and related forms provide that FmHA/FHA, its agents and attorneys have at all times the right to inspect and examine the properties. Debtors are warned that the loans involve intense supervision by FmHA/FHA. FmHA/FHA supervisors were to make as many visits as necessary to the properties to achieve the objectives for which the loans were made.

Homeowners are required to carry out repairs that FmHA/FHA request and implement home management plans as FmHA/FHA may prescribe. Homeowners are required to purchase fire, earthquake and extended coverage insurance but insurance to cover loss against flooding only when required by FmHA/FHA and in the event that debtors fail to obtain such insurance FmHA/FHA was to acquire policies, charge them to the debts and increase payments accordingly. Homeowners are required to personally occupy the properties within

60 days of execution of the forms and not lease or use for other purposes.

The interest credit agreements provide that FmHA/FHA may terminate the agreement if, among other things, debtors have left or ceased to occupy the properties without the consent of FMHA/FHA. Debtors cannot build structural extensions, excavations, or other alterations in the properties or establish any business such as workshops or stores on the properties.

D. Statement of Lower Court Jurisdiction Under Rule 14.1 (g) (ii)

The United States District Court for the District of Puerto Rico had subject matter jurisdiction of this civil matter under The Federal Tort Claim Act, 28 USC Section 1346 (b)(1) and 2671-2680. Petitioners assert tort claims against the United States arising from negligent supervision and inspection of the site and construction of Petitioners' homes. The United States Court of Appeals for The First Circuit had jurisdiction of the appeal taken by Petitioners pursuant to 28 U.S.C. Section 1291.

Reasons For Granting The Writ

I- The Petition for Writ of Certiorari should be granted because the Court of Appeal's holding in this case to the effect that Petitioners' claims are barred by the misrepresentation and discretionary function exceptions of the Federal Tort Claims Act is completely irreconcilable with this Court's Opinion in *Block v. Neal,* 460 U.S. 289 (1989).

In *Block v. Neal,* 460 U.S. 289, 75 L.Ed.2d 67, 103 S.Ct. 1089 (1983), this Court held that a homeowner's claim for negligence against Farmers Home Administration officials in supervising construction of her home was not barred by the misrepresentation exception of the Federal Tort Claims Act. In *Block* as in this case, the home was to conform to FmHA requirements and FmHA was to inspect the property to ensure compliance with its requirements. Both the Circuit Court in *Block*, and this Court held that the claim for negligence was not barred by the FTCA, which precludes recovery for any claim arising out of misrepresentation because the homeowner, did not seek to recover on the basis of misstatements made by FmHA officials but rather, as in this case, on negligent supervision. As noted in the Courts opinion: "one who undertakes to act, even though gratuitously, is required to act carefully and

with the exercise of due care, and will be liable for injuries proximately caused by failure to use such care". *Id.* at 293.[1]

The Court of Appeals in this case, noted that this Court's opinion in *Block*, "reasoned that if, as was alleged, the FmHA undertook an active role in the construction of the plaintiff's home (thus going far beyond mere assurances regarding the quality of the structure, it might be held to have assumed an additional duty under the Good Samaritan doctrine." Such a duty would obligate the government "to use due care to ensure that the builder adhere to

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[1] In *Neal v. Bergland*, 646 F.2d. 1178 (6th Cir. 1981), the Court of Appeals, in that case, held that the complaint stated a claim for relief against the Secretary of Agriculture and officials of Farmers Home Administration under the FTCA on the theory that the Agency had negligently inspected plaintiffs' home. As here, the contract provided that construction conform to FmHA approved plans and the contractor was required to issue a builder's warranty as required by FmHA which represented that construction was in conformance with the drawings and specifications approved by FmHA and the minimum property standards published by the Department of Housing and Urban Development. *Id. at 1179*, "Congress, we believe intended plaintiff to be the beneficiary of the inspection and technical assistance offered by FmHA given the purpose of the Housing Act and plaintiff's particular circumstances". *Id.* at 1184. The Court of Appeals in *Block* found that to prevail under the Good Samaritan doctrine, *Neal* must show that FmHA officials voluntarily undertook to supervise construction of her house, that the officials failed to use due care in carrying out their supervisory activity; and that she suffered some pecuniary injury proximately caused by FmHA's failure to use due care. *Block* at 297.

previously approved plans and cure all defects before completing construction, [which] is distinct from any duty to use care in communicating information." App. A at 11a.

The District Court acknowledged that "in the present case, the Government could be liable if it had voluntarily assumed a duty to supervise or oversee the construction of Plaintiffs' homes" and that, "Courts in earlier cases have found that such a duty existed, based on government regulations which required FmHA or FHA agents to supervise and inspect the construction of homes that were to be purchased with Government-backed loans..." App. B at 31-32a.

In *Block*, this Court stated that it was not, "called on to consider whether recovery is barred by any other provision of the Tort Claims Act, including the exception for any action, based upon the exercise or performance or the failure to exercise or perform a discretionary function". *Id.* at 294.

On the basis of this, the Court of Appeals, in this case, concludes that, "On this issue, *Block* is wholly inapposite, and that this Court, "noted explicitly that the question before it did not require consideration of "whether recovery is barred by any other provision of the Tort Claims Act, including the exception for ...a discretionary function" App. A at 11a-12a. Petitioners contend that if this Court had

seen fit to preclude the plaintiff's claim, in Block, on the basis of the discretionary function exception, it would have done so. In *Irving v. U.S.*, 162 F. 3d 154 (1st Cir. 1998), the Court of Appeals held that the discretionary function exception to the FTCA foreclosed a worker's negligence claims given the broad discretion granted to OSHA compliance officers in conducting administrative inspections. In its opinion in *Irving*, the Court of Appeals stated with respect to *Block v. Neal supra.* and *Indian Towing Co. v. United States*, 350 U.S. 61, 100 L. Ed. 48, 76 S.Ct. 122 (1955) that, "neither case implicated the discretionary function exception'. *Irving*, 162 F.3d 154, 161 n6.

Respondent in this case, committed in writing to supervise the project by way of detailed, mandatory inspections at each stage, which included before, during, after construction and after occupation. The supervision as specified in the loan documentation also includes determining the need for flood insurance and measures (home management plans) and requiring Petitioners to acquire flood insurance or that Respondent acquire flood insurance and charge it to Petitioners' debts. These commitments were in writing and delivered to each home purchaser in response to agency guidelines and/or regulations. The inspections are the method of implementing the supervisory duties in the

regulatory framework of the agencies in this case. The Court of Appeals undermines the ruling in *Block* by treating the inspections separate from the duty to supervise rather than as an integrated regulatory scheme.

The Court of Appeals, in denying Petitioners' claims, relies on cases decided prior to and which conflict with this Court's decision in *Block v. Neal*[2]. An example *is Baroni v. United States,* 662 F. 2d 287 (5th Cir. 1981) where the Court held that even if the

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[2] Various post *Block* decisions cited by the Court of Appeals also apply the misrepresentation exception to bar FTCA claims against the same agencies involved in this case. In *Farmers State Savings Bank v. Farmers Home Admin,* 891 F.2d 200 (8th Cir. 1989), a bank sued Respondent for failure to make a loan which it understood FmHA had agreed to make, the Court applied the misrepresentation exception to bar the claim on facts which are substantially distinguishable from the facts in the present case. Petitioners here seek compliance with regulatory provisions which require supervision of their homes not additional funding for business purposes, as in *Farmers State Savings Bank.* In *Commercial Union Ins. Co. v. United States,* 928 F 2d 176 (5th Cir. 1991) the Court held that an insurers claim for improper approval of respiratory equipment used by insured's employees was barred by the misrepresentation exception to the FTCA on the basis that the transmission of misinformation was a necessary link in the causal chain from the alleged negligence to injuries to insured's workers and reliance on the Government's publicly disseminated approval to establish a causal connection. In *McNeily v. United States.,* 6 F.3d 343 (5th Cir. 1993), the Court held that claims of a liquidator of a limited partnership investment fund were barred by the FTCA's discretionary function exception or fraud and misrepresentation exception without specifying which.

government's undertaking created a duty under state law, recovery was barred by the misrepresentation exception to the Federal Tort Claims Act.

A similar situation occurred in *Perez v. United States*, 594 F.2d 280 (1st Cir. 1979) also decided prior to this Court's opinion in *Block*, holding that there was no duty on the part of defendant running to plaintiffs. A third pre-*Block* case is *Green v. United States*, 629 F. 2d 581 (9th Cir. 1980) which applied the misrepresentation exception to preclude economic loss claims and also applies the discretionary function exception on the basis of "planning level" decisions.

II. The Court of Appeal's Opinion conflicts with this Court's holding in *Berkovitz v. United Sates*, 486 U.S. 531 (1988) because there are specific regulatory provisions applicable to this case which preclude all discretion on the part of the agencies involved with respect to housing in flood prone areas.

The Opinion of the Court of Appeals in this case, notes that the "jurisprudence of the FTCA permits us to classify these actions as non-discretionary only if a federal statute, regulation, or policy specifically instructed federal officials to follow a specified course of action." App. A at 13a.

The Court further notes that, "plaintiffs refer to additional provisions in the Housing Act and its implementing regulations, that suggest that FmHA must play a role that goes substantially beyond the mere provision of financing for home construction." It notes that "Section 506 authorizes technical services. 42 USC Sec 1476 (a)." "The earlier regulations suggested that providing adequate supervision was obligatory. 7 CFR section 1822. 7 (a)(1977)." The regulations "intimate that FmHA officials are under an obligation to ensure that borrowers' homes meet certain technical construction standards." App. A at 15a. Petitioners assert that the manner in which supervision is to be carried out is specified in the loan documentation presented to the home purchasers pursuant to agency guidelines.

Furthermore, the Court of Appeals overlooks the regulatory provision cited by Petitioners in its Brief which required Respondent to verify that the first floor elevation of Petitioners' homes were above the 100-year flood level. The Code of Federal Regulations, Title 7, Chapter XV11, Subchapter A, Part 1806, Subpart B, Section 1806.25 provides:

> FmHA financial assistance may be extended to eligible applicants meeting the eligibility requirements of § 1806.24 of this subpart, provided the following conditions are also met:

> (a) *Dwelling and multi-unit housing facilities.* (1) If the financial assistance is to buy a dwelling or multi-unit housing facility:
> (i) The first floor elevation of the habitable space of the dwelling or housing unit must be above the 100-year flood level.
> (ii) The housing must be served by public utilities and facilities, such as sewer, gas, electrical and water systems that are located and constructed to minimize or eliminate flood damage, or have an onsite water supply system and waste disposal system located so as to avoid impairment of such systems and contamination from the waste disposal system to the water supply system from flooding.

Respondent thus, was prohibited by its regulations from approving dwellings whose first floor elevation was below the 100-year flood level. The fact that Petitioners' homes are subject to recurrent flooding is indicative that the floor elevations are below the 100-year flood level. Respondent was negligent in performing its supervisory duties with respect to Petitioners' homes

because Respondent failed to ensure that the first floor elevations were above the 100-year flood level prior to completion of construction of the development and at any time thereafter.

In *Berkovitz v. United States,* 486 U.S. 531, 100 L.Ed 2d 531, 108 S.Ct. 1945 (1988), this Court held that the discretionary function exception to the FTCA was not a complete bar to suit based upon federal licensing of an oral polio vaccine and release of the vaccine lot to the public. The Court noted that, "In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee." *Berkovitz* at 540. "The discretionary function exception does not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. In this event, the employee has no rightful option but to adhere to the directive." *Id.* at 541. "The relevant legislative materials demonstrate that the exception was designed to cover not all acts of regulatory agencies and its employees, but only such acts as are 'discretionary' in nature." In other words, "Congress intended the discretionary function exception to apply to the discretionary acts of regulators, rather than to all regulatory acts." *Berkovitz at 542 n 4.* Thus, in *Berkovitz*, this Court determined that, "If petitioners aver that the DBS licensed Orimune either without determining whether

the vaccine complied with regulatory standards or after determining that the vaccine failed to comply, the discretionary function exception does not bar the claim." *Id.*, at 545. As in *Berkovitz*, Petitioners in the present case charge a failure on the part of the agency to determine that the site of the homes was flood prone, or determined that the site was flood prone but failed to perform its clear duty under its regulatory framework.

If Petitioners' claim is viewed to allege that the agency made a determination that didn't comply with regulatory standards and that the determination is incorrect, the question turns on whether the manner and method of determining compliance with the safety standards at issue involve agency judgment of the kind protected by the discretionary function exception. "Application of the discretionary function exception to the claim that the determination of compliance was incorrect hinges on whether the agency officials making that determination permissibly exercise policy choice." *Id at 546.* The regulations in this case clearly indicate that the agency officials had no discretion or choice with respect to the appropriate elevation of dwellings it approved.

Where regulations are abstruse and there is a scanty record, the issue whether agency officials appropriately exercise policy judgment in

determining compliance with relevant standards is better left to the District Court. *Berkovitz* at 546.

If an agency's policy, "leaves no room for an official to exercise policy judgment in performing a given act, or if the act simply does not involve the exercise of such judgment, the discretionary function exception does not bar a claim that the act was negligent or wrongful." *Id* at 547. Where, as here, a petitioner may show, on the basis of materials obtained in discovery or otherwise, that the challenged agency conduct does not involve permissible exercise of policy discretion, the invocation of the discretionary function exception to dismiss a claim is improper. *Berkovitz at 548.*

In *United States v. Gaubert,* 499 U.S. 315, 113 L.Ed. 2d 335, 111 S. Ct. 1267 (1991), this Court held that the discretionary function exception of the Federal Tort Claims Act barred claims against federal agencies for negligent supervision of savings and loan operations. In reaching this determination, this Court noted that, "[t]he exception covers only acts that are discretionary in nature, acts that involve an element of judgment or choice." "The requirement of judgment or choice is not satisfied if a 'federal statute regulation or policy specifically prescribes a course of action for an employee to follow,' because, 'the employee has no rightful option but to adhere to the directive." *Gaubert at* 346. The agencies, in this

case, were to perform detailed, mandatory inspections to verify, among other things, that the floor levels of the homes were not below the 100-year flood level. They had no rightful option but to adhere to this clear directive.

In *Berkovitz v. United States, supra., as here,* this Court, "examined a comprehensive regulatory scheme and found that some of the claims fell outside the exception because the agency employees had failed to follow the specific directions contained in the applicable regulations, *i.e.* in those instances, there was no room for choice or judgment." "If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy." *Gaubert at 347.* "In addition, an agency may rely on internal guidelines rather than on published regulations." *Gaubert at 348.* Just as in *Indian Towing Co. v. United States*, 350 U.S. 61, 100 L.Ed. 48, 76 S.Ct 122 (1955), the United States was held liable, not because the negligence occurred at the operational level but because making sure the light was operational did not involve any permissible exercise of policy judgment, *Gaubert at 349*, Respondent here was charged with supervising the site and construction of Petitioners' homes so that the first floor elevations of Petitioners' homes were above the 100-year flood level and failed to do so.

The actions complained of in *Gaubert* were very different from the negligent actions in the present case. In *Gaubert,* Petitioners complained of recommendations for hiring a financial consultant, urging a change to a federal charter, advice on bankruptcy, mediating salary disputes, reviewing a draft of a complaint and intervening with a state regulatory agency. *Id.* at 344-5. While in the present case, Respondent refused to follow its own unambiguous mandate, which prohibited Respondent's involvement in housing that did not meet clear cut requirements.

Other opinions cited by the Circuit Court are significantly distinguishable on the facts from the present case. *Lundstrum v. Lyng,* 954 F.2d 1142 (6th Cir. 1991) involved a claim against FmHA for additional funding, protected under the discretionary function exception of the FTCA and holding that a plaintiff did not possess a protected property interest in additional funding from FmHA. *Id at 1147.* Petitioners here seek mitigation measures and compensatory relief for damages sustained as a result of Respondent's failure to comply with its regulatory duties.

In *Pennbank v. United States*, 779 F.2d 175 (3rd Cir. 1985), the Court held that the expenditure of federal funds for a municipal sewer project was clearly a discretionary governmental

activity barring an action under the Federal Tort Claims Act based on negligence in failing to inspect and discover defects in construction of the sewer project. There, a bank sued the federal agency for a negligent inspection of a project financed by the bank. The Court noted significantly, and contrary to the present case, that "neither in the agency agreements with the Authority nor in the banks' loan agreements to the Authority is found the responsibility of the government to monitor the construction itself." *Id.* at 180

Another case heavily relied on by the Circuit Court is *Shansky v. United States*, 164 F.3d 688 (1st Cir. 1999), where the Court held that the agency's conduct in rehabilitating a site was discretionary and policy driven, however in that case, unlike the current situation, there was an absence of any particular directive governing rehabilitation of the site. *Id.* at 69 1-2

The Court of Appeals' opinion in this case, also cites *United States v. Varig. Airlines,* 467 U.S. 797, 81 L.Ed.2d 660, 104 S.Ct. 2755 (1984), there this Court held that a tort action against the United States, based upon the Federal Aviation Administration's aircraft certification process was precluded by the discretionary function exception. The regulatory scheme in *Varig,* however, was very different from that of the agencies involved in the

present case, the supervision and inspections in *Varig* were delegated to the airplane manufacturers, the federal agents made only spot checks and, "[I]t was not intended that the inspector personally conduct a complete conformity inspection of each part he records on a (CAA) form." *Id* at 677.

Here in contrast, Respondent's inspectors were required to inspect the site and construction of every home, to determine the eligibility for federal programs. More specifically, Respondents' agents were to require that the first floor level of every home was above the 100-year flood level and patently failed to do so. Having undertaken to provide its supervisory and technical services, Respondent was required to perform carefully and comply with its regulations, in light of the clear regulatory mandate. Respondent's failure to comply with the applicable regulations cannot be masked as discretionary.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT FILED APRIL 7, 2003

United States Court of Appeals
For the First Circuit

No. 02-2011
RUFINO MUÑIZ-RIVERA ET AL.,
Plaintiffs, Appellants,
v.
UNITED STATES OF AMERICA
Defendant, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. Héctor M. Laffitte, **U. S. District Judge**]

Before
Torruella, **Circuit Judge**,
Coffin, **Senior Circuit Judge**,
and Selya, **Circuit Judge**.

Ruth Santiago, for appellants.
Steve Frank, Attorney, Appellate Staff, Civil Division, Dep't of Justice, with whom **Robert D. McCallum, Jr.**, Assistant Attorney General, **Guillermo Gil**, United States Attorney, and **Robert S. Greenspan**, Attorney, were on brief, for appellee.

April 7, 2003

Selya, Circuit Judge. This appeal requires us to address the parameters of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, and, in particular, its misrepresentation and discretionary function exceptions. The plaintiffs (appellants here) are 108 persons who own a total of 67 residential properties in Salinas, Puerto Rico. These homes are situated in two housing developments that have undergone repeated flooding. Noting that federal officials played a significant role in the planning, siting, construction and financing of the projects, the plaintiffs seek to hold the government answerable in damages. They sue under the FTCA, a statutory scheme that carves out a tort based exception to the federal government's sovereign immunity. But the FTCA's exception to sovereign immunity itself contains exceptions. Because the plaintiff's claims, as stated, fall within spheres that the FTCA abjures, we conclude that the district court properly dismissed the amended complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1).

We afford plenary review to a district court's order of dismissal for lack of subject matter jurisdiction. *Corrada Betances v. Sea-Land Serv., Inc.*, 248 F.3d 40, 44 (1st Cir. 2001). At the pleading stage, such an order is appropriate only when the facts alleged in the complaint, taken as

true, do not justify the exercise of subject matter jurisdiction. *Royal v. Leading Edge Prods., Inc.*, 833 F.2d 1, 1 (1st Cir. 1987). In line with the foregoing, we glean the relevant background information from the plaintiff's amended complaint, accepting the well-pleaded factual averments contained therein and indulging all reasonable inferences in the plaintiffs' favor. *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 365 (1st Cir. 2001).

The plaintiffs purchased their homes at various times between 1973 and 1995. All of them obtained loans through the Farmer's Home Administration (FmHA), the Federal Housing Administration (FHA), or some other federal agency. They attribute their current predicament to the government's negligence.

In their view, the principal difficulty is that the government sited the housing developments along the Nigua River basin. That area has endured flooding both before and after the developments were built. The amended complaint enumerates no fewer than eight major floods (occurring in 1928, 1933, 1956, 1970, 1975, 1985, 1992, and 1996). Progressive soil movement has placed unaccustomed strains on foundations, and most plaintiffs report structural damages to walls, roofs and floors. Moreover, poor drainage results in a backflow of sewage whenever flooding

occurs. Over time, these conditions have taken their toll: the plaintiffs say that their dwellings are now in "total ruin" and "unfit" for human habitation. They themselves have experienced mental anguish and emotional distress.

The plaintiffs filed unsuccessful administrative claims with the appropriate agencies in 1998 and 2000 and, in the same time frame, brought suit in the United States District Court of Puerto Rico.[1] Their amended complaint alleges that the government had an intimate involvement with the planning and construction of the housing developments. For example, federal agencies (1) approved the specifications under which the dwellings were built; (2) granted mortgage loans in which they reserved the right to inspect the properties and obligated the plaintiffs to execute any repairs that they requested; (3) compelled the seller's of the homes to issue builder's warranties; and (4) retained the right to insist upon certain types of insurance coverage. The amended complaint proceeds to list a litany of

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[1] Originally, the plaintiffs asserted claims premised not only on the FTCA, but also on the Little Tucker Act, 28 U.S.C. §1346(a)(2), and Puerto Rico law. In an unpublished order, the district court dismissed all of the non-FTCA claims. *See Muñiz-Rivera v. United States*, No. 98-2001 (D.P.R. Sept. 25, 2000). Because the plaintiffs have not challenged that order, we confine ourselves to a consideration of the FTCA claims

acts and omissions that form the basis for the government's putative liability. These include the government's supposed failures to (1) inspect the plaintiff's properties with adequate care; (2) scrutinize the topography and detect the substantial likelihood of future flooding; (3) provide reasonable oversight during construction; (4) warn the plaintiffs that their homes were in a floodway zone; (5) require the plaintiffs to carry flood insurance (or advise them of the need for it); and (6) take appropriate measures to protect the homes from flooding.

The government responded to the plaintiffs' amended complaint with a motion to dismiss. The district court, in a scholarly opinion, granted the motion. Muñiz-Rivera v. United States, 204 F. Supp. 2d 305 (D.P.R. 2002). The plaintiffs now appeal that ruling. Although our reasoning differs slightly from the district court's, we affirm the order of dismissal. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F. 3d 201, 204 (1st Cir. 1994) (explaining that an appeals court is "free to affirm the judgment below on any independently sufficient ground made manifest by the record").

The FTCA constitutes "a limited waiver of the federal government's sovereign immunity" against private suits. *Shansky v. United States*, 164 F. 3d 688, 690 (1st Cir. 1999). The narrowing adjective is necessary because there are a number

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of situations in which the waiver will not attach. The government contends that the plaintiffs' claims fall within the compass of these exceptions. If so, the instant action is outside the ambit of federal subject matter jurisdiction. *See Hydrogen Tech, Corp. v. United States*, 831 F. 2d 1155, 1161 (1st. Cir. 1987) (holding that the FTCA's exceptions "define the limits of federal subject matter jurisdiction in this area"). We test the government's hypothesis by classifying the plaintiffs' claims and the evaluating each category of claims through the prism of the FTCA's exceptions.

The first category of claims includes the plaintiffs' accusations that the government negligently failed to warn of the danger of future flooding, advise the plaintiffs of the need for flood insurance, and inform them that their homes were not constructed stoutly enough to withstand the ineluctable forces of nature. Despite the plaintiffs' disclaimers, these allegations necessarily rest on the premise that the federal government had a duty to exercise due care in communicating useful information regarding the safety and security of the plaintiffs' properties; that the plaintiffs reasonably relied on government officials to fulfill this duty; and that the government let them down.

We need not decide whether the government owed such a duty to the plaintiffs. Assuming, for

argument's sake, that it did, any breach of the duty would fall squarely within the FTCA's misrepresentation exception.

The misrepresentation exception immunizes the United States from liability for "[a]ny claim arising out of... misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). The exception extends to a wide range of communicative activity (including failures of communication). The leading case on this exception is *United States v. Neustadt*, 366 U.S. 696 (1961), in which a home buyer reasonably relied on an erroneous FHA appraisal. *Id.* at 698-700. In declaring that the plaintiff's claim for ensuing economic harm was barred by the misrepresentation exception, the Supreme Court observed that, in enacting section 2680 (h), Congress "clearly meant to exclude claims arising out of negligent, as well as deliberate, misrepresentation." *Id.* at 702. Thus, the exception insulates the government against liability for conveying false or inaccurate information. *Id.* at 706-07; *see also Jimenez-Nieves* v. *United States*, 682 F.2d 1, 4 (1st Cir. 1982) (noting that misrepresentation, as an independent tort, is comprised of the dissemination of false information and the reliance by the plaintiff upon that information). The case law makes manifest that the prophylaxis of the misrepresentation

exception extends to failures of communication. *See, e.g., JBP Acquisitions* v. *United States*, 224 F. 3d 1260, 1265 (11th Cir. 2000); *Green v. United States*, 629 F. 2d 581, 584 (9th Cir. 1980).

In this case, the plaintiffs' first set of claims are grounded in just such a theory of liability. The plaintiffs contend that the government's intimate role in approving, financing, and monitoring the housing projects implicitly conveyed an assurance that the homes constituted secure domiciles, and that the lack of any warning calculated to alert the plaintiffs to the likelihood of future harm reinforced those implied assurances. Even if such acts and omissions were negligent – a matter on which we take no view – the misrepresentation exception precludes the assertion of a cause of action against the government based upon either miscommunication or non-communication of the information in question. *See JBP Acquisitions*, 224 F. 3d at 1266 (holding that a "failure to communicate, as well as direct miscommunication, is encompassed by the misrepresentation exception"). *Green*, 629 F. 2d at 584 (noting that the misrepresentation exception "bar[s] suits based on a failure to give any warning to injured parties").

The plaintiffs also accuse the government of negligently inspecting their homes and failing to detect the likely problems associated with future

flooding. These claims are likewise precluded by the misrepresentation exception. A negligent inspection, in and of itself, cannot cause injury. Harm can occur (and, thus, liability can attach) only if the inspection leads either to the communication of inaccurate information or to a failure to communicate precautionary information. *See Farmers State Sav. Bank v. FmHA*, 891 F.2d 200, 202 (8th Cir. 1999) (holding that injuries to FTCA plaintiffs who allege faulty inspection or assessment are "caused by reliance on the representations of government officials performed negligently"); *see also Comm'l Union Ins. Co. v. United States*, 928 F. 2d 176, 179 (5th Cir. 1991) (holding that the misrepresentation exception covers instances in which "the chain of causation from the alleged negligence to the alleged injury depends upon the transmission of misinformation by a government agent"). This takes us full circle – and brings the negligent inspection claims within the purview of the misrepresentation exception. *See e.g., Schneider v. United States*, 936 F.2d 956, 961-62 (7th Cir. 1991) (holding that the misrepresentation exception precludes a suit seeking recovery for damages from a federal agency's approval of defective building materials); *Baroni v. United States*, 662 F. 2d 287, 289 (5th Cir. 1981) (per curiam) (holding to like effect in connection with the FHA's underestimation of the

predicted flood in connection with the development); *cf. Preston v. United States*, 596 F. 2d 232, 238 (7th Cir. 1979) (holding that an FTCA claim alleging negligent auditing "amounts to an allegation of misrepresentation by implication").

We turn now to the second category of claims: those related to the government's role in supervising the construction of the plaintiffs' homes. Invoking the Supreme Court's decision in *Block v. Neal*, 460 U.S. 289 (1983), the plaintiffs argue that the misrepresentation exception does not apply and that the government may be held liable in tort. We agree with the first half of this argument but not with the second.

In *Block*, the Supreme Court ruled that although the misrepresentation exception protects the federal government from liability relating to the negligent communication (on non-communication) of information, "it does not bar negligence actions which focus... on the government's breach of a different duty." *Id.* at 297. The Court further reasoned that if, as was alleged, the FmHA undertook an active role in the construction of the plaintiff's home (thus going far beyond mere assurances regarding the quality of the structure), it might be held to have assumed an additional duty under the Good Samaritan

doctrine.[2] *Id.* Such a duty would obligate the government "to use due care to ensure that the builder adhere to previously approved plans and cure all defects before completing construction [which] is distinct from any duty to use due care in communicating information." *Id.* Applying *Block*, we hold that this second category of claims lies outside the realm of the misrepresentation exception.

This does not mean, however, that the case should have been allowed to proceed. The government also invokes the FTCA's discretionary function exception. On this issue, *Block* is wholly inapposite; although the *Block* Court found that the misrepresentation exception did not bar the claim there at issue, it noted explicitly that the question before it did not require consideration of "whether recovery is barred by any other provision of the Tort Claims Act, including the exception for... a

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[2] As a general matter, the Good Samaritan doctrine imposes a duty of due care upon one who gratuitously undertakes to perform a service upon which a plaintiff justifiably relies. See Restatement (Second) of Torts §§ 323, 324'A (1965). The doctrine is recognized both in federal and Puerto Rico law. *See Indian Towing Co. v. United States*, 350 U. S. 61, 69 (1955); *Piñeiro Manzano v. Estado Libre Asociado*, 102 P. R. Dec. 795, 801-02 (1974). Puerto Rico law is relevant on this issue because the FTCA requires a determination of negligence to be made "in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b) (1).

discretionary function." *Id.* at 294 (citing 28 U.S.C. § 2680 (a).

The discretionary function exception insulates the United States against "[a]ny claim... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. §2680(a). Ascertaining whether the government may invoke this exception involves a "familiar analytic framework." *Shansky*, 164 F. 3d at 690. First, an inquiring court must identify the conduct that allegedly caused the harm. *Id.* at 690-91. Then, in determining whether Congress sought to shelter that sort of conduct from tort liability, the court must ask two interrelated questions: (1) Is the conduct itself discretionary? (2) If so, does the exercise of discretion involve (or is it susceptible to) policy-related judgments? If both of these queries yield affirmative answers, the discretionary function exception applies and the government is shielded from liability. *See United States v. Gaubert*, 499 U.S. 315, 322-23 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988); *Irving v. United_States*, 162 F. 3d 154, 162 (1st Cir. 1998) (en banc); *see also United States v. Varig Airlines*, 467 U.S. 797, 809-10 (1984) ("It is neither desirable nor intended that... the propriety

of a discretionary administrative act should be tested through the medium of a damage suit for tort.") (citation and internal quotation marks omitted).

The conduct that lies at the epicenter of the plaintiffs' remaining claims involves the government's failure carefully to supervise the construction of the housing projects and its attendant failure to protect the residents from the easily foreseeable string of floods. These allegations are best handled discretely, as identifying the precise conduct in question resolves much of the requisite analysis.

With respect to the duty to supervise construction, the plaintiffs target the government's role in planning the housing developments, siting the homes in a floodway zone, and allowing them to be built in such a way that they could not withstand the ravages of repeated flooding. The jurisprudence of the FTCA permits us to classify these actions as non-discretionary only if a federal statute, regulation, or policy specifically instructed federal officials to follow a specified course of action. *See Gaubert*, 499 U.S. at 322; *Berkovitz*, 486 U.S. at 536; *Irving*, 162 F.3d at 163. To fill this gap, the plaintiffs point to section 502 of the Housing Act of 1949, 42 U.S.C. § 1472 (2000), and the implementing regulation that were in force when the Salinas housing developments were

built.[3] These regulations, the plaintiffs asseverate, provided sufficient discretion that the conduct in question cannot be deemed discretionary. We therefore examine the regulations' content and purpose.

Section 502 of the Housing Act authorized (and still authorizes) the Secretary of Agriculture to extend financial assistance to qualified individuals "to enable them to construct, improve, alter, repair, or replace dwellings... in order to provide them... with decent, safe, and sanitary living conditions." *Id.* § 1471 (a) (1). The regulations in force when construction began in Salinas described the purpose of these loans as being "to give families, who do not have sufficient resources... an opportunity to have adequate homes." *Neal v. Bergland*, 646 F. 2d 1178, 1180 (6thCir. 1981) (quoting 7 C.F.R. § 1822.2). These provisions operate at such a high level of generality that they are of little use to the plaintiffs here. *See Shansky*, 164 F.3d at 691 (explaining

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[3] On June 12, 1980, the regulations cited by plaintiffs were amended to disclaim any possible government liability. *See* Planning and Performing Construction and Other Development Amendment-Redesignation, 45 Fed. Reg. 39, 789, 39, 803 (1980) (codified at 7 C.F.R. § 1924.9 (2002)). The revised rules, which are still in force, alert borrower that they are solely responsible for making the necessary inspections to ensure the quality of their homes. *See* 7 C.F.R. §§ 1924.9 (a), 1924.9 (b) (5) (2002).

that general directives are insufficient to brand particular conduct as non-discretionary).

The plaintiffs refer to additional provision in the Housing Act and its implementing regulations that suggest that FmHA must play a role that goes substantially beyond the mere provisions of financing for home construction. For example, section 506 of the Housing Act authorized (and still authorizes) the Secretary of Agriculture to provide "technical services such as building plans, specifications, construction supervision and inspection, and advice and information regarding farm dwellings and other buildings." 42 U.S.C. § 1476(a). The earlier regulations suggested that providing adequate supervision was obligatory. *See* 7 C.F.R. §1822.7 (a) (1977) ("Supervision will be provided borrowers to the extent necessary to achieve the objectives of the loan and to protect the interests of the Government..."); *see also Block*, 460 U.S. at 291 n.2 (describing the role of FmHA officials under that regulatory regime in assisting borrowers to obtain construction and inspection services).

These regulations cannot carry the weight that the plaintiffs load upon them. Although they intimate that FmHA officials are under an obligation to ensure that borrowers' homes meet certain technical construction standards, they neither direct the manner in which the supervision

is to be carried out nor specify the taking of the actions that the plaintiffs claim would have prevented their plight. The regulations do not speak to supervising the planning of a housing development, selecting its location, or making the homes flood-proof at any cost. Deeming administrative action to be non-discretionary requires a specific and directly applicable prescription, *see Fagot Rodriguez v. Costa Rica*, 297 F.3d 1, 10 (1st Cir. 2002), and such a prescription is lacking here. Because the plaintiffs point to no applicable statute, regulation or policy bearing the requisite degree of specificity, we conclude that the conduct complained of was discretionary. *See Shansky*, 164 F.3d at 691.

We next turn to the conduct at issue in the plaintiffs' "failure to protect" claim. Here, the conduct complained of is non-conduct, that is, inaction on the part of government officials, resulting in a failure to erect levees or pursue a comparable public works agenda in Salinas. The plaintiffs have offered no statutory or regulatory provisions that provide explicit information regarding such subjects, and the lack of such directives brands the inaction as discretionary. *Fagot Rodriguez*, 297 F. 3d at 10; *Shansky*, 164 F. 3d at 691.

The short of it is that the plaintiffs can point to no statutory or regulatory provision that requires

the performance of any of the charged non-communicative conduct. Consequently, that conduct is within the purview of agency discretion. *See Gaubert*, 499 U.S. at 324-25 ("For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of a regulatory regime.").

This brings us to the final question: Is this discretionary conduct grounded in policy? There is a presumption that it is. *See id.* at 324; *Irving*, 162 F.3d at 168. In this case nothing alleged by the plaintiffs regarding either the evolution of the housing projects or the lack of government action to protect residents from floods undermines that presumption.

The driving force behind these claims is the notion that the federal government did not do enough – but such hypothesized interventions, virtually by definition, involve examination of priorities and determinations of need that are at the heart of policy-making. In a world of finite public resources, government officials must weigh competing considerations in the selection, location, and outfitting of housing projects. While such decisions are often difficult to make (and easy to criticize in hindsight), *See Gaubert*, 499 U.S. at 325; *Irving*, 162 F.3d at 168. For these reasons,

courts have acknowledged the central role of policy considerations in implementing government loan programs and have held that the discretionary function exception shields the government from FTCA claims in similar circumstances. *See, e.g., Lundstrum v. Lyng*, 954 F. 2d 1142, 1146 (6th Cir. 1991) (per curiam) (resting dismissal of FTCA claim on the discretionary function exception because government officials "engage[d] in policy judgments when deciding the most effective and efficient methods to supervise and service FMHA loan recipients"); *Pennbank v. United States*, 779 F. 2d 175, 180 (3rd Cir. 1985) (arriving at a similar result because "the processes and standards utilized by the agencies... clearly involve[d] the exercise of discretion").

That ends this phase of our inquiry. We find that the plaintiffs' claims against the government for negligently supervising the planning and construction of the housing developments and failing to protect home buyers are barred by the FTCA's discretionary function exception. The plaintiffs have suffered great hardships, but an FTCA action is not the proper vehicle to demand accountability for arguably unwise or unthinking decisions made pursuit to administrative discretion.

We need go no further. To recapitulate, we hold that the plaintiffs' claims that the government

negligently failed to warn, to inform of the impending danger, to mandate flood insurance, and to inspect the homes are all barred by the FTCA's misrepresentation exception. We hold that the plaintiffs' claims that the government failed properly to supervise the planning and construction of the housing projects and to take appropriate measures to prevent future flooding are barred by the FTCA's discretionary function exception. In combination, these holdings confirm that the district court appropriately dismissed the plaintiffs' suit for want of federal subject matter jurisdiction.[4]

Affirmed.

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[4] Because these holdings are dispositive of all the plaintiffs' claims, we need not address other defenses raised by the United States, such as the incidence of the statute of limitations, the effect of the change in the governing regulations as of June 12, 1980 (*see supra* note 3), and the applicability vel non of the Good Samaritan doctrine to the facts of this case.

APPENDIX B – OPINION AND ORDER OF THE UNITED STATES DISTRICT FOR THE DISTRICT OF PUERTO RICO DATED MAY 20, 2002

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

RUFINO MUÑIZ RIVERA, et al.
Plaintiffs,

Civil No. 98-2001 (HL)

v.

UNITED STATES OF AMERICA,
Defendant

OPINION AND ORDER

Before the Court is a motion to dismiss by the United States of America. Plaintiffs are home-owners residing in the La Margarita and Extensión La Margarita housing developments in Salinas, Puerto Rico.[1] There are 108 plaintiffs who own a

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[1] In their amended complaint, Plaintiffs state that they are bringing this claim as a class. They have not, however, moved for class certification pursuant to Rule 23. Accordingly, the Court treats this as a claim by a group of individual plaintiffs.

total of 67 properties.[2] They bring this action against the Government pursuant to the Federal Tort Claims Act ("FTCA").[3]

At the outset, the Court must determine what standard of review is required for this motion. The motion before the Court is a motion to dismiss for lack of subject matter jurisdiction, which challenges the validity of the FTCA claim. Accordingly, the Court credits Plaintiffs' well-pleaded allegations in both the complaint and in the sworn statement appended to their opposition to the Government's motion and draws all reasonable inferences in their favor. *See Valentin v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).

Plaintiffs bought their homes between 1973 and 1995.[4] They purchased these homes with loans obtained through the federal Farmers Home Administration ("FmHA"), the U.S. Department of Agriculture, the Federal Housing Administration

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[2] Docket no. 35. Pursuant to an earlier order, Plaintiffs appended to their amended complaint a list of all Plaintiffs with the corresponding date of purchase of each home and the dates that each individual filed administrative claims with the Government. It appears that Plaintiffs Pedro Colón and Ivonne Rodríguez own two properties: one which they purchased in 1978 and a second they purchased in 1990.

[3] 28 U.S.C.A. § 1346(b) (West 1993 & Supp. 2001) & §§ 2671-2680 (West 1994 & Supp. 2001).

[4] Docket no. 35.

("FHA"), and the Department of Housing and Urban Development. They allege that these homes were built in accordance with specifications approved by these federal agencies; that the sellers of the homes issued builder's warranties for the purpose of inducing these agencies to make loans for the purchase of the properties; that the deeds provided that the federal agencies had the right to inspect the properties; and that the plaintiffs were obligated to make repairs that the agencies requested and to obtain fire and earthquake insurance. The homeowners were obligated to obtain flood insurance only when the federal agencies so required it.

The two developments are located in the Nigua River "floodway zone." It has been the site of "major flooding" in 1928, 1933, 1956, 1970, 1975, 1985, 1992 and 1996. Flooding also occurred in the community in 1992, 1997 and 1998. Additionally, the sewer and drainage systems are inadequate: they back up when the river's level rises. As a result, Plaintiffs allege that their homes are subject to "substantial flooding" and soil movement; that their properties have sustained damage to their land as well as to the foundations, walls, roofs and floors of their homes; and that this recurrent flooding makes the properties unfit for their intended use.

Plaintiffs claim that their damages were caused by the negligence of government agents. Specifically, they allege that these agents were negligent in their duty to inspect Plaintiffs' properties; that they were negligent in their duty to warn Plaintiffs of the area's conditions; that they failed to inform Plaintiffs of the need for flood insurance; that they failed to take measures to protect Plaintiffs' properties; that they were negligent in their duty to supervise the construction of the homes; that they were negligent in their duty to detect the development's susceptibility to flooding and the inadequacies of the sewer and drainage systems; that they were negligent in their duty to require or take measures to protect Plaintiffs' properties from flood damages; and that they failed to build retaining levees or take other appropriate measures to stop rising flood waters.

In its motion to dismiss, the Government argues that Plaintiffs' claims are time-barred and that they are precluded by the misrepresentation and discretionary function exceptions to the FTCA. Plaintiffs have opposed the motion to dismiss. For the reasons set forth below, the Court grants the motion to dismiss.

DISCUSSION

As the sovereign, the United States may not be sued without its consent. *Lehman v. Nakshian*, 453 U.S. 156, 160, 101 S.Ct. 2698, 2701, 69 L.Ed.2d 548 (1981); *Day v. Mass. Air Nat'l Guard*, 167 F.3d 678, 681 (1st Cir. 1999). The FTCA is a limited waiver of the United States' sovereign immunity from liability. *Dynamic Image Technologies v. United States*, 221 F.3d, 39 (1st Cir. 2000); *Day*, 167 F.3d at 681. The limits of that waiver define a federal court's jurisdiction. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980). It is a waiver, however, that must be strictly construed in favor of the government. *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 2963, 92 L.Ed. 2d 250 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685, 103 S.Ct. 3274, 3278, 77 L.Ed.2d 938 (1983); *Dynamic Image*, 221 F.3d at 39; *Weldon v. United States*, 70 F.3d 1, 4 (2nd Cir. 1995). Under the FTCA, the government is liable to the same extent that a private individual would be under similar circumstances in accordance with the law of the place where the act occurred. 28 U.S.C.A. §1346(b)(1); *Abreu-Guzman v. Ford*, 241 F.3d 69, 75 (1st Cir. 2001); *Dynamic Image*, 221 F.3d at 39.

The FTCA is replete with exceptions. *See* 28 U.S.C.A. §2680. In its motion, the Government claims that it is protected by the exception which precludes claims of misrepresentation. *See id.* § 2680(h). The essence of a misrepresentation claim is that there be a "communication of misinformation" upon which the plaintiff has relied. *Block v. Neal*, 460 U.S. 289, 296, 103 S.Ct. 1089, 1093, 75 L.Ed. 67 (1983). The Government will not be liable for an injury resulting from a commercial decision made by plaintiff in reliance on a misrepresentation by a government agent. *Saraw Partnership v. United States*, 67 F.3d 567, 570 (5th Cir. 1995); *Jimenez-Nieves v. United States*, 682 F.2d 1, 4-5 (1st Cir. 1982). This exception applies to more than mere affirmative statements; a claim based on a failure to warn or to communicate will also be barred. *See JBP Acquisitions v. United States*, 224 F.3d 1260, 1265-66 (11th Cir 2000); *Green v. United States*, 629 F.2d 581, 584-85, (9th Cir. 1980); *Preston v. United States*, 596 F.2d 232, 238-9 (7th Cir. 1979); *Mullens v. United States*, 785 F.Supp 216, 219-20 (D.Me. 1992), *aff'd*, 976 F.2d 724 (1st Cir 1992) (Unpublished table text); *Harrah v. Miller*, 558 F.Supp. 702, 706 (S.D.W.Va. 1983).

In the present case, Plaintiffs' allege, among other things, that government agents were negligent (1) in their duty to warn Plaintiffs of the

area's propensity to flooding and (2) in their failure to inform Plaintiffs of the need for flood insurance. These are claims, in effect, that the Plaintiffs suffered an injury because they relied on a communication of misinformation by government agents. That is, they bought their homes because they were never warned of any risk of flooding and they neglected to obtain adequate flood insurance because they were never told to do so. Even though Plaintiffs do not use the word "misrepresentation" in their allegations, these claims are still barred by that exception. In determining whether one of the FTCA exceptions comes into play, a court must look beyond the literal meaning of the complaint and ascertain the true nature of the cause of action. *United States v. Neustadt*, 366 U.S. 696, 703-04, 81 S.Ct. 1294, 1297, 6 L.Ed 2d 614 (1961). The claims regarding the failure to warn of the risk of flood and the failure to advise Plaintiffs that they should obtain flood insurance are claims that Plaintiffs relied on a communication of misinformation and that as a result they suffered an injury. *See Mullens*, 785 F.Supp. at 219-20; *Harrah*, F.Supp. at 706. Thus, they are barred by the misrepresentation exception.

Plaintiffs also assert that the Government is liable based on alleged negligence in the duty to inspect the properties and the duty to detect the problems in drainage, sewage, and flooding. The

mere failure to inspect and detect, by itself, is not sufficient to impose liability. A negligent inspection could not have caused Plaintiffs' injuries, for any defects would already have been present in the houses. *See Hamre v. United States*, 799 F.2d 455, 457 (8th Cir. 1986). Any faulty inspection, therefore, must be accompanied by some other conduct sufficient to create liability. If Plaintiffs are arguing that government agents were negligent in inspecting the property and that they informed Plaintiffs that the property did not suffer from defects and that Plaintiffs purchased their homes in reliance on this information, then this claim is barred by the misrepresentation exception. *See Neustadt*, 366 U.S. at 704-07, 81 S.Ct. at 1299-1301; *Schneider v. United States*, 936 F.2d 956, 959-62 (7th Cir. 1991); *Farmers State Savings Bank v. Farmers Home Administration*, 891 F.2d 200, 202 (8th Cir. 1989); *Bonuchi v. United States*, 827 F. 2d 377, 379-80 (8th Cir. 1987); *Hamre*, 799 F.2d at 457; *Pritchett v. Milstid*, 891 F.Supp. 1541, 1547-48 (S.D.Ala. 1995); *Pennbank v. United States*, 599 F.Supp 1579- 1581-82 (W.D.Pa. 1985, *aff'd on other grounds by* 779 F.2d 175 (3rd Cir. 1985); *Scott v. First Investment Corp.*, 556 F.Supp. 782, 785 (W.D.Pa. 1983).

If, however, Plaintiffs' allegation of negligence in inspection and detection is part of

their claim that government agents were negligent in their supervision of the construction of their homes, the Court's analysis takes a different tack. A claim of negligence in the supervision of the construction of homes purchased with FHA or FmHA loans might be able to proceed under the FTCA. *See Block*, 460 U.S. at 296-299, 103 S.Ct. at 1093-1095. In the consideration of this claim, it is important to underscore that the Government is liable under the FTCA to the same extent that a private person would be under similar circumstances in accordance with the law of the place where the act occurred. 28 U.S.C.A. §1346(b)(1); *Abreu-Guzman*, 241 F3d at 75; *Dynamic Image*, 221 F.3d at 39. There must be a relationship between the plaintiff and the government employee which would, under local law, impose a duty in a purely private sector setting. *Sea Air Shuttle Corp. v. United States*, 112 F.3d 532, 537 (1st Cir. 1997); *Zabala Clemente v. United States*, 567 F.2d 1140, 1143-44 (1st Cir. 1977). In their amended complaint, Plaintiffs refer to Article 1802 of the Puerto Rico Civil Code[5], but in their opposition to the motion to dismiss they cite to no case that holds that under Article 1802 a private person lending money to a home-buyer is obliged to inspect and supervise the construction

[5] 31 P.R. LAWS ANN. §5141 (1991).

of the home that is to be purchased.[6] Thus, their reliance on Article 1802 is not sufficient to support their theory. *Cf. Zabala Clemente*, 567 F2d at 1143 (noting that while the civil code's concept of fault may be broad, it does not seem to support a claim that it is tortious conduct to fail to inspect another person's property and warn that person of

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[6] Plaintiffs did cite to two Puerto Rico Supreme Court cases that dealt with a bank's liability for defects in homes that were purchased with a loan from that bank. *Amaro Gonzalez v. First Fed. Savings Bank*, 132 P.R.Dec. 1042 (1993); *Chase Manhattan Bank v. Emmanuelli Bauzá*, 111 P.R.Dec. 708, 11 Official Translations 893 (1981). In *Chase*, the court held that there was no factual or legal support for a finding that the bank was a constructor or a developer that could be liable for construction defects. 111 P.R.Dec. at 710-713, 11 Official Translations at 896-99. And in *Amaro González*, a group of homeowners in a housing development which had been built on heavily contaminated land sued the bank that had made the loans for the purchases of the homes. 132 P.RDec. at 1044. The Supreme Court held that the bank could be liable for its negligence in carrying out its banking functions if it financed the purchase of the homes even though it knew or should have known of the contamination. Id at 1063.

In the present case, Plaintiffs' theory is based upon the Government's alleged negligence in supervising and overseeing the construction of their homes. The Supreme Court in *Amaro González* did not rule that the bank could be liable under a similar theory. Thus, even if the Court were to assume that the ruling in *Amaro González* could make a private person liable under Puerto Rico law, that case's holding does not support the Plaintiffs' cause of action in the present case.

impending injury, unless there is some duty to the owner of the property).

That is not to say that the analysis ends here. Plaintiffs claim is one based on an alleged breach of a regulatory or oversight duty for which private persons are not normally liable under local law. *See Sea Air*, 112 F.3d at 537. In other FTCA cases where the plaintiff has alleged that the Government has breached a similar duty, courts have viewed the claim through the prism of the Good Samaritan doctrine. *See Indian Towing Co. V. United States*, 350 U.S. 61, 64-69, 76 S.Ct. 122, 124-27, 100 L.Ed 48 (1955); *Johnson v. Sawyer*, 47 F.3d 716, 728 (5th Cir. 1995); *Howell v. United States*, 932 F.2d 915, 918 n3 (11th Cir. 1991)(collecting cases); *Moody v. United Sates*, 774 F.2d 150, 155n.6(6th Cir. 1985); *Zabala Clemente*, 567 F.2d at 1145; *Mr. (Vega Alta), Inc. v. Caribe Gen Elec. Products*, 31 F.Supp.2d. 226, 237 (D.P.R. 1998; *Kirk v. United States*, 604 F.Supp. 1474, 1480-84 (D.N.H. 1985). Under this doctrine, when a party – in this case, the Government – gratuitously undertakes to perform a service upon which the plaintiff justifiably relies, the Government will have a duty to perform that service with an appropriate standard of care. The Government will be liable if it failed to exercise reasonable care in the performance of this duty and if the plaintiff justifiably relied on this

performance to his or her detriment. *Indian Towing*, 350 U.S. at 69, 76 S.Ct. at 126-27; Restatement (Second) of Torts §§323 & 324A (1965). As Plaintiffs acknowledge in their opposition to the motion to dismiss, the Puerto Rico Supreme Court has recognized this doctrine.[7] See *Piñeiro Manzano v. Estado Libre Asociado*, 102 P.R. Dec. 795, 801-02, 2 Official Translations 1028, 1036 (1974).

In the present case, the Government could be liable if it had voluntarily assumed a duty to supervise or oversee the construction of Plaintiffs' homes. Courts in earlier cases have found that such a duty existed based on government regulations which required FmHA or FHA agents to supervise and inspect the construction of homes that were to be purchased with Government-

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[7] Docket 54, at 5. Plaintiffs also cite to two cases on this doctrine. *See Carrasquillo v. Am. Missionary Assoc.*, 61 P.R.R. 837 (1943); *Chapman v. E.S.J. Towers*, Inc. 803 F.Supp. 571 (D.P.R. 1992). These cases are not what the Restatement would consider to be good samaritan cases. *Carrasquillo* involved a claim that a hospital was negligent in its treatment of a newborn baby. 61 P.R.R. at 839. In *Chapman* the plaintiff was a hotel guest who was injured by criminals that entered the hotel premises. He claimed that defendant was negligent in failing to ensure the safety of the premises. 803 F.Supp. at 572-73. These cases did not discuss whether the defendant was liable because it had gratuitously undertaken to perform a service upon which the plaintiff had detrimentally relied.

backed loans.[8] *See Neal v. Bergland*, 646 F.2d 1178, 1180-84 (6th Cir. 1981), *aff'd sub nom. Block v. Neal*, 460 U.S. 289, 103 S.Ct. 1089, 75 L.Ed.2d 67 (1983); *Kirk*, 604 F.Supp. at 1479-81; *Park v. United States*, 517 F.Supp. 970, 974-75, 977-78 (D.Or. 1981).

The force of these government regulations does not support the claims of all Plaintiffs in the present action. This is due to the fact that the relevant regulations were amended, effective June 12, 1980. *See* 45 Fed. Reg. 39,789 & 39,803 (1980) (codified at 7 C.F.R. pt. 1924). The amended regulations state that the individual borrower is responsible for making any inspections necessary to protect his interest; that the Government inspections are not intended to assure the borrower that the house is being built in accordance with any plans or specifications; that "[t]he inspections create or imply no duty or obligation to the particular borrower;" and that "[t]he borrower should make enough periodic

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[8] Generally, a government agent's breach of a federal regulatory duty will not be, by itself, sufficient to give rise to a FTCA negligence claim. *Sea Air*, 112 F.3d at 536; *Johnson*, 47 F.3d at 727-28; *Art Metal-U.S.A., Inc. v. United States*, 661 F.2d 552, 560 (6th Cir. 1981). The regulations may, however, create duties which could subject the Government to liability under local tort law for a breach of those duties. *Johnson*, 47 F.3d at 728; *Moody*, 774 F.2d at 156 n.8; *Art-Metal-U.S.A.*, 753 F.2d at 560; Mr. (Vega Alta), 31 F.Supp.2d at 237.

visits to the site to be familiar with the progress and performance of the work, in order to protect the borrower's interest." 7 C.F.R. § 1924.9(a) & (b)(5) (2001) (emphasis added). In the wake of these amendments, it cannot be held that the Government has voluntarily undertaken a duty to supervise or inspect the construction of the homes or that the borrowers could reasonably rely on the Government's inspection or supervision of the constructions. *See Moody*, 774 F.2d at 156-57; *Cash v. United States*, 571 F. Supp. 513, 515-16 (N.D.Ga. 1983). In the present case, twenty-one of the properties were purchased after the new regulations took effect on June 12, 1980. Because of the changes in the regulations, the Government did not owe these purchasers a duty to supervise or inspect their homes, and these purchasers were therefore not justified in relying on any Government inspection or supervision. Accordingly, the Court dismisses the claims of these owners.

There remain, then, the claims of those Plaintiffs who purchased their home prior to June 12, 1980. The Government argues that these claims are time-barred.[9] This issue goes to the

[9] The Government argues in its motion to dismiss that all the Plaintiffs' claims are time-barred. However, because the Court dismisses the claims of those individuals who purchased their properties after June 12, 1980, on other grounds, it applies the

question of the Court's jurisdiction to hear this suit. *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002). An FTCA claim will be time-barred unless the plaintiff has filed an administrative claim with the appropriate government agency within two years of the tort's accrual. 28 U.S.C.A. § 2401(b) (West 1994); *Coska v. United States*, 114 F.3d 319, 322 (1st Cir. 1997). Of the remaining Plaintiffs, the owners of forty-five of the properties filed administrative claims on both February 26, 1998, and February 29, 2000; the other owner filed only one claim, on February 29, 2000.[10] It is unclear, but it appears that Plaintiffs filed two sets of administrative claims because they are basing their cause of action on the flooding which occurred in 1996 and 1998.

Plaintiffs' administrative claims will be timely only if their tort claims accrued as of February 26, 1996, and February 28, 1998. The accrual date of a FTCA claim is a question of federal law. *Bartleson v. United States*, 96 F.3d 1270, 1276 (9th Cir. 1996); *Miller v. United States*, 932 F.3d 301, 303 (4th Cir. 1991). Generally, a tort claim accrues at the time of the injury.

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timelines analysis only to those Plaintiffs who purchased their properties before June 12, 1980.

[10] Docket no. 35.

Gonzalez, 284 F.3d at 288; *Attallah v. United States*, 955 F.2d 776, 779 (1st Cir. 1992). If an injury and its cause are not immediately apparent, the claim will accrue either at the time the plaintiff discovers his injury or at the time the plaintiff, in the exercise of reasonable diligence, could have discovered it. *Attallah*, 955 F.2d at 780.

As mentioned above, Plaintiffs appear to be bringing claims for flooding which occurred in 1996 and 1998. The problem with these claims is that the properties were purchased in 1980 or before. The alleged tortious government conduct would have occurred at the time of purchase – eighteen years or more prior to the filing of the administrative claims. Between the time Plaintiffs purchased their homes and the time of the 1996 flooding the properties had already been flooded on a number of earlier occasions. In their amended complaint, Plaintiffs allege that major flooding occurred in 1975, 1985, and 1992. The Government argues that therefore Plaintiffs knew, or should have known, of their injury by 1992, and that their administrative claims filed in 1998 and 2000 are untimely.

Plaintiffs raise a series of arguments to counter the Government's reasoning. In one of them, Plaintiffs rely on the jurisprudence regarding accrual in cases that involved government takings

of a continual nature.[11] *See United States v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947); *Applegate v. United States*, 25 F.3d 1579 (Fed. Cir. 1994); *Cooper v. United States*, 827 F.2d 762 (Fed. Cir. 1987). The plaintiffs in those cases brought Fifth Amendment claims for what they alleged were the takings of their properties. The issue there was when the taking claim accrued. The Supreme Court in Dickinson held that when the taking is caused by a continuous process, it is not complete, for purposes of determining when the claim arose, "until the situation becomes stabilized." 331 U.S. at 749, 67 S.Ct. at 1385. The present case, however, does not involve a taking of Plaintiffs' properties; rather it involves a claim for tortious conduct. The question here is when a tort occurred, not when a taking occurred. Therefore, the Court need not consider the takings cases cited by Plaintiffs.

Plaintiffs also argue that their claims are timely owing to the continuous nature of the flooding. This argument obfuscates the distinction between a continuing act and a single act that "'brings continuing consequences in its roiled wake.'" *Johnson v. Rodriguez*, 943 F.2d 104, 108

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[11] In their opposition to the motion to dismiss, Plaintiffs incorporated their arguments from an earlier opposition. Docket no. 54, at 8 n.2; docket no. 26. Accordingly, the Court considers the arguments Plaintiffs have raised in both their oppositions.

(1st Cir. 1991) (quoting *Gilbert v. City of Cambridge*, 932 F.2d 51, 58-59 (1st Cir. 1991)). An accrual date may be delayed if a plaintiff has suffered a continuing tort or a continuing violation. A continuing violation occurs when there is a series of continual unlawful acts, not when there are merely continual harmful effects from an original unlawful act. *Nesovic v. United States*, 71 F.3d 776, 778 (9th Cir. 1995); *Diliberti v. United States*, 817 F.2d 1259, 1264 (7th Cir. 1987); *Bergman v. United States*, 751 F.2d 314, 316-17 (10th Cir. 1984); *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981); *Lazarini v. United States*, 898 F.Supp. 40, 45 (D.P.R. 1995), aff'd 89 F.3d 823 (1st Cir. 1996) (Unpublished table text); *see also O'Rourke v. City of Providence* 235 F.3d 713, 730 (1st Cir. 2001); *Rodriguez Montalvo v. Municipality of Arecibo,* 30 F.Supp.2d 118, 121 (D.P.R. 1998). When there is a continuing tort, the cause of action accrues when the tortious conduct ceases. *Page v. United States*, 729 F.2d 818, 821-22 (D.C.Cir. 1984); *Maslauskas v. United States*, 583 F.Supp. 349, 351 (D.Mass. 1984).

In the present case, Plaintiffs allege that Government agents were negligent in supervising and overseeing the construction of their homes. This alleged tortious conduct would have been completed at the time of the purchase of the homes. Plaintiffs may suffer the effects of this

negligence every time flooding occurs in their housing development. This does not mean, however that their claim is one for a continuous tort. They do not allege that Government agents committed a series of ongoing violations. Rather, Plaintiffs are suffering the continual injurious consequences of alleged tortious conduct which has long since ceased. *See Johnson*, 943 F.2d at 108; *Ward*, 650 F.2d at 1147. To hold otherwise would be to start a new statute of limitations every time a flood occurred. *See Harrell v. Fleming*, 285 F.3d 1292, 1293 (10th Cir. 2002); *Bowyer v. United States Dep't of Air Force*, 875 F.2d 632, 638-39 (7th Cir. 1989); *Bergman*, 751 F.2d at 317. This the Court cannot do.

There remains the issue of when these claims accrued. The alleged tortious conduct would have ceased at the time that Plaintiffs purchased their homes. At that time, however, there had been no flooding. Thus, Plaintiffs had not yet suffered any injury. In 1975, 1985, and 1992 their properties were flooded. By this third flood they should have known that they had suffered an injury. Therefore, their claims seem to be time-barred.

Plaintiffs claim that the accrual of their claims should be tolled pursuant to the discovery

rule.[12] Under this rule, a claim will accrue "when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the factual basis of the cause of action." *Gonzalez*, 284 F.3d at 288; *Attallah,* 955 F.2d at 780. This is an objective standard. For there to be a tolling of the statute of limitations pursuant to the discovery rule, the factual basis for plaintiff's case must have been "'inherently unknowable'" at the time of his injury. *Gonzalez*, 284 F.3d at 288-89 (*quoting Attallah*, 955 F.2d at 780).

Once a plaintiff knows of an injury and its probable causes, it becomes incumbent upon him to make the necessary inquiries to determine whether he has a cause of action. *United States v. Kubrick*, 444 U.S. 111, 123, 100 S.Ct. 352, 360, 62 L.Ed.2d 259 (1979); *Gonzalez,* 284 F.3d at 289. The limitations period will begin to run regardless of whether a plaintiff has made these inquiries. *Gonzalez*, 284 F.3d at 289. Furthermore, the statute of limitations will begin to run even though the plaintiff may not know all of the relevant facts pertaining to his claim. *Gonzalez*, 284 F.3d at 289;

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[12] In their discussion of the discovery rule, Plaintiffs cite to jurisprudence from Puerto Rico and Louisiana federal courts. The question of accrual in FTCA claims, however, is one of federal law. *Bartleson*, 96 F.3d at 1276. Thus, the authorities cited by Plaintiffs are inapposite.

see *also Morris v. Gov't Dev. Bank of Puerto Rico*, 27 F.3d 746, 750 (1st Cir. 1994).

In the present case, Plaintiffs argue in their opposition that they did not immediately realize that their housing development was subject to continual flooding. This argument is belied by their amended complaint in which they allege that their houses are in what has been, since 1928, a "known flood area" and that major floods occurred there in 1928, 1933, 1956, 1970, 1975, 1985, 1992, and 1996.[13] These Plaintiffs would have suffered injuries caused by the flooding in 1975, 1985, and 1992. By 1992 they should have known, with the exercise of reasonable diligence, that they had suffered an injury and that they had a cause of action. Plaintiffs have appended to their opposition a sworn statement from Jeanette Perez Maceira, one of the plaintiffs. In it, she avers that Plaintiffs did not become aware that flooding was a recurrent problem until September 1996. There is no explanation, either in this sworn statement or in the briefs why they could not have made this discovery sooner.

In her sworn statement, Perez Maceira refers to an Army Corps of Engineers report that was issued in September 1996 which found that flooding was a recurrent problem in the area. If

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[13] Docket no. 35, at 6.

this report is how Plaintiffs first learned of the continuing nature of the problem, it would be insufficient to allow them to invoke the discovery rule. First, the floods of 1975, 1985, and 1992 should have put Plaintiffs on notice of a problem. Second, it was incumbent upon Plaintiffs, not the Army Corps of Engineers, to make the necessary inquiries to determine what was the cause of this problem and whether they had a viable cause of action. *See Kubrick*, 444 U.S. at 123, 100 S.Ct. at 360; *Gonzalez,* 284 F.3d at 289. The limitations period on their claims began to run regardless of whether they had made these inquiries. See *Gonzalez*, 284 F.3d at 289. Plaintiffs' argument that they were somehow unable to discover their cause of action earlier is unsupported and therefore unavailing.

Plaintiffs offer another argument: that the limitations period should have been tolled because of Government assurances that it would take measures to prevent the flooding. The Court reads this argument to be one invoking the equitable estoppel doctrine. Under equitable estoppel, the Government is estopped from raising a statute of limitations defense when the plaintiff's untimeliness is due to his justified reliance on the Government's false or misleading statements or conduct. *Berman v. United States*, 264 F.3d 16, 20 (1st Cir. 2001); *see also Irwin v. Dep't of Veterans*

Affairs, 498 U.S.89, 96, 111 S.Ct. 453, 457-58, 112 L.Ed.2d 435 (1990). For there to be equitable estoppel, there must be some affirmative government misconduct. *Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 67 (1st Cir. 1999); *Frillz, Inc v. Lader*, 104 F.3d 515, 518 (1st Cir. 1997); Bell v. Fowler, 99 F.3d 262, 268-69 (8th Cir. 1996); *Dring v. McDonnel Douglas Corp.*, 58 F.3d 1323, 1329 (8th Cir. 1995). The defendant must have acted with an improper purpose or it must have had constructive knowledge of the deceptive nature of its conduct. *Kale v. Combined Ins. Co.*, 861 F.2d 746, 752 (1st Cir. 1988).

In the present case, Plaintiffs' claim that they did not pursue their claims more aggressively because federal government agencies had made assurances that they intended to implement flood control measures. The assurances upon which Plaintiffs claim to have relied are the following: in 1990 the Government issued a "Reconnaissance Report", recommending unspecified measures to control the flooding; after the 1992 flood, Plaintiffs were informed that improvements were planned according to this 1990 report; and in 1996 a "final Feasibility Report for flood control" was published

by the Army Corps of Engineers.[14] Plaintiffs further assert that there have been constant delays and snags in the implementation of these plans.

This government action is not sufficient to warrant equitable relief from the limitations provisions of the FTCA. First, there is no allegation of specific Government promises or guarantees that it would correct the flooding problem. Plaintiffs mention only reports which recommended that unspecified measures be taken or assurances that unspecified steps were being planned. At most, this conduct indicated that government officials were aware of this problem and were attempting to address it. There were, however, no promises on which Plaintiffs could have justifiably relied. Moreover, there is no evidence or allegation that the Government's statements and reports regarding the flooding were motivated by an intent to deceive or mislead Plaintiffs. There is absolutely no indication of affirmative government misconduct. Thus, there is no support for a claim of equitable estoppel. It appears that bureaucratic inefficiencies or institutional inertia has resulted in a less than swift government reaction to Plaintiffs' plight. Although this is certainly lamentable, it is not

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[14] Docket no. 26, at 9-10; docket no. 54, sworn statement of Jeanette Perez Maceira.

sufficient to justify estopping the Government from raising a statute of limitations defense.[15]

Based on all of the above, therefore, the Court finds that Plaintiffs who purchased their homes prior to June 12, 1980, should have known by the time of the 1992 flood of factual bases of their FTCA causes of action. They did not file their first set of administrative claims until 1998. Thus, their claims for negligence in the supervision and oversight of the construction of their home are time-barred.

Lastly, Plaintiffs also bring a claim based on the Government's alleged failure to take appropriate measures such as building retaining levees, to stop rising flood waters.[16] This appears to be a claim not against those Government agents who administered the loan programs, but against

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[15] Although not expressly invoked by Plaintiffs, the equitable tolling doctrine may also be used to avoid the statue of limitations. Equitable tolling will be justified when the plaintiff could not have discovered, even in the exercise of reasonable diligence, facts essential to his claim. *Gonzalez*, 284 F.3d at 291. The circumstances that caused the plaintiff to miss a deadline must have been entirely out of his hands. Id. The Court's treatment above of the discovery rule is equally applicable here. Nothing in the record establishes that there were circumstances beyond Plaintiffs' control which prevented them, in the exercise of reasonable diligence, from discovering earlier the facts essential to their claim. Therefore, the equitable tolling doctrine provides no succor to Plaintiffs' claim.

[16] Docket no. 35, ¶ 25.

the employees of those agencies charged with preventing floods. Presumably, this is a claim against the Army Corps of Engineers. *See* 33 U.S.C.A. § 540 (West 2001) ("Federal investigations and improvements of rivers, harbors and other waterways shall be under the jurisdiction of and shall be prosecuted by the Department of the Army under the direction of the Secretary of the Army and the supervision of the Chief of Engineers..."); *Devito v. United States*, 12 F.Supp.2d 269, 270 (E.D.N.Y. 1998). The Government does not address this claim in its motion to dismiss. Thus, this claim remains.

The Court notes, however, that this claim is not without its obstacles. For this claim to proceed, Plaintiffs must have presented a timely administrative claim with the appropriate federal agency. *See* 28 U.S.C.A. § 2401(b). Furthermore, it may be barred by other statutory provisions which provide the Government with immunity in such situations. *See* 33 U.S.C.A. § 702c (West 2001) ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."). As the Government has not addressed this claim in its motion to dismiss, the Court makes no ruling now on the viability of this last claim.

WHEREFORE, the Court **grants** the motion to dismiss (docket no. 50).

IT IS SO ORDERED.
San Juan, Puerto Rico, May 20, 2002.

"s/HECTOR M. LAFFITTE"
Chief U.S. District Judge